IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 31

McLEAN TRUCKING COMPANY, INC., THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, AND AMERICAN FARM BUREAU FEDERATION,

Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ASSOCIATED TRANSPORT, INC., ARROW CARRIER CORPORATION, BARNWELL BROTHERS, INCORPORATED, CONSOLIDATED MOTOR LINES, INCORPORATED, HORTON MOTOR LINES, INCORPORATED, McCARTHY FREIGHT SYSTEM, INC., M. MORAN TRANSPORTATION LINES, INC., SOUTHEASTERN MOTOR LINES, INCORPORATED, TRANSPORTATION, INCORPORATED, THE TRANSPORT COMPANY, KUHN, LOEB & COMPANY, BARNWELL WAREHOUSE & BROKERAGE COMPANY, BROWN EQUIPMENT & MANFACTURING COMPANY, CONGER REALTY COMPANY, AND SOUTHERN NEW ENGLAND TERMINALS, INC.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR AMERICAN FARM BUREAU FEDERATION, APPELLANT.

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AMERICAN FARM BUREAU FEDERATION,
APPELLANT.**

PRELIMINARY STATEMENT.

The American Farm Bureau Federation is a corporation not for profit, organized under the laws of the State of Illinois. Its membership represents more than one-half million farm families in forty states of the United States. It has substantial membership in the states along the Atlantic seaboard and in the South, the territory served by the motor carriers involved in this proceeding, and many of its members are served by the motor carriers, parties to the proposed merger herein, or by their competitors. The Federation is organized, among other purposes, to promote, protect and represent the business, economic, social and educational interests of the farmers of the nation. It endeavors to promote the interests of its members and of farmers generally in the maintenance of low-cost transportation of farm products and farm supplies. It is committed to the support of the national policy of effective competition in the transportation industry. The American Farm Bureau Federation petitioned and was granted leave to intervene in and become a party to the present proceeding before the Interstate Commerce Commission (R. 494). As a party to the proceeding before the Interstate Commerce Commission and pursuant to Section 212 of the Judicial Code (28 U.S.C. 45a) and Rule 24 of the Rules of Civil Procedure for the District Courts of the United States, it filed its motion to intervene as a party plaintiff in the proceedings in this matter before the District Court of the United States for the Southern District of New York (R. 73). It joined with the original plaintiff and the Secretary of Agriculture of the United States in the appeal to this Court.

Official Report of Opinion Below.

The official report of the opinion delivered in this matter in the Court below entitled, *McLean Trucking Co. Inc. v. United States, et al*, is found in 48 F. Supp. 933.

Jurisdiction, Statement of the Case, Specification of Errors to be Urged.

For the purposes of this brief, the American Farm Bureau Federation as an intervening plaintiff in the original proceedings and Appellant here adopts the statements found in the brief for the Secretary of Agriculture of the United States and in the brief for the original plaintiff with respect to the proceedings and opinions below, the jurisdiction of this Court, the statement of the case and the specifications of the errors to be urged.

Scope of Argument.

This Appellant further adopts the brief for the Secretary of Agriculture of the United States with respect to the arguments presented upon the several assignments of error but desires to submit the following separate and additional argument upon two assignments of error, namely:

1. The Court erred in holding that the order of the Commission was valid notwithstanding the fact that the Commission in finding whether the proposed transaction would be "consistent with the public interest" did not consider the effect of the proposed transaction in the light of the provisions and policies of the Antitrust laws as well as the effect of proposed transaction upon adequate transportation service to the public and the preservation of the inherent advantages of motor carrier transportation.

2. The Court erred in that it did not consider and determine the important public questions under Section 5(2)(b) of the Interstate Commerce Act arising from the facts with reference to the relationship between Arrow Carrier Corporation, Kuhn, Loeb & Company, Transport Company, Inc., and Associated Transport, Inc.

Summary of Argument.

The Court and the Interstate Commerce Commission erred in determining the weight to be given to the preservation of competition as a factor in determining "public interest." The Commission may not approve a merger or consolidation of motor carriers which results in the elimination of substantial competition unless it finds upon the basis of substantial evidence that the elimination of such competition is necessary in order to provide an adequate transportation system in the area involved.

The substantial stock interest which would have accrued to Kuhn, Loeb & Company under the merger agreement would constitute a railroad affiliation inconsistent with the public interest. The Court should construe Section 5(2)(b) of the Interstate Commerce Act for the guidance of the Commission in any further proceedings in the present case or any similar cases hereafter brought.

ARGUMENT.

I.

The Court erred in holding that the order of the Commission was valid notwithstanding the fact that the Commission in finding whether the proposed transaction would be "consistent with the public interest" did not consider the effect of the proposed transaction in the light of the provisions and policies of the Anti-trust laws as well as the effect of the proposed transaction upon adequate transportation service to the public and the preservation of the inherent advantages of motor carrier transportation.

The Interstate Commerce Commission, in its report in this proceeding, asserted that Congress had vested in the Commission discretionary authority to permit or refuse mergers of competing motor carriers. The Commission took the position that such discretionary authority had been placed wholly within the judgment of the Commission by the provisions of Section 5 of the Interstate Commerce Commission Act (49 U.S.C.A. 5). The Commission's order was based upon this interpretation of the statute. Paragraph 2 of Section 5 of the Interstate Commerce Commission Act provides for the consolidation and merger of carriers where the proposed transaction is within the scope of the section. It requires the Commission to find that the proposed transaction is consistent with the public interest before the Commission may approve the transaction. Paragraph 11 of Section 5 provides that the carriers, their officers and employees and any other persons "par-

ticipating in a transaction approved or authorized under the provisions of this section shall be and they hereby are relieved from the operation of the Antitrust laws and their restraints, limitations and prohibitions of law, federal, state or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, * *." The Commission in effect held that under this statutory authority it could approve transactions which result in substantial restraints of competition under the Antitrust laws if the Commission, in its discretion, was of the opinion that the transaction would be consistent with the public interest. The Court upheld this interpretation of the authority of the Commission. In taking the position that the Congress has placed the granting or denying of authority for these consolidations or mergers wholly within the judgment of the Commission where the transaction will be consistent with the public interest and that the Commission is free to decide what amount of competition is in furtherance of the public interest and what is not, the Commission and the Court have overlooked certain essential elements of public interest as defined by the Court and certain criteria laid down by the Transportation Act of 1940. The Commission and the Court seem to follow the policies prescribed for the consolidation of railroads under the Transportation Act of 1920. They did not take into consideration the changes made by the Transportation Act of 1940 and the national transportation policy as declared by Congress in enacting the Transportation Act of 1940. Nor did they take into consideration the historical development of the applicable laws and the manner in which the present statute differs from former provisions relating to railroad consolidations.

Historically, the Cullom Act of February 4, 1887, was the first general Federal law providing for the regulation of charges by railroads. The enactment of this legislation was significant as an expression of the popular feeling at that time. It resulted in no small measure from the demands of midwestern farmers, as expressed by the Granger movement. This Act sets forth prohibitions against unreasonable rates, unjust discrimination, undue preference and undue prejudice and the charging of a greater amount under substantially similar circumstances and conditions for a short haul than for a longer haul over the same line in the same direction, the shorter being included in the longer. It was essentially an anti-discrimination statute. *Interstate Commerce Acts, Anno*, Vol. 1, page 75. A few years later, on July 2, 1890, the Sherman Act (15 U.S.C.A. 1) was enacted. This statute was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called "competition"—the play of the contending forces ordinarily engendered by an honest desire for gain. *United States* v. *American Tobacco Company*, 221 U. S. 106.

The rule of competition prescribed by the Sherman Act was applicable to railroads and this court held numerous attempts to consolidate railroads and eliminate competition to be in violation of the Sherman Act. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Northern Securities Co.* v. *United States*, 193 U. S. 197. From its enactment in 1890 until the adoption of the Transportation Act of 1920, the Sherman Act was applicable to consolidations by railroads in restraint of competition. The Commerce Act as amended was designed to protect the public against discrimination and unreasonable charges.

During World War I, the railroads were taken over and operated by the United States Government. With the return of the railroads to private control and operation, the Transportation Act of 1920 was enacted. This Act introduced a new railroad policy into Federal legislation. Theretofore efforts of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 Act sought to insure also adequate transportation service. *Akron C. & Y. R. Co.* v. *United States*, 261 U. S. 184. In addition to provisions designed to assure railroads adequate revenue to enable the whole transportation system to be maintained and the assistance provided weaker roads through the recapture provisions, Section 5 of the Interstate Commerce Act was rewritten to permit the combination and consolidation of carriers where the Commission found such consolidation to be in the "public interest." The Commission was instructed to prepare a plan for the consolidation of railway properties of the continental United States into a limited number of systems. The Congress directed, however, that "under such plan competition shall be preserved as fully as possible." Proposed consolidations thereafter were required to be in harmony with and in furtherance of the plan of consolidation approved by the Commission. This 1920 Act further provided that carriers entering into any such consolidation approved by the Commission were relieved from the operation of the Antitrust laws insofar as necessary to enable them to carry out the consolidation. But these consolidations were required to be in the "public interest." It was contended that this requirement that the consolidation be in the public interest was invalid as a delegation of legislative authority because the criteria were uncertain. This court, however, held that the term "public

interest" as used in the Transportation Act of 1920 was "not a concept without ascertainable criteria but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities." *New York Central Securities Corporation* v. *United States,* 287 U. S. 12 at 25.

By the Transportation Act of 1940, the provisions for consolidation and merger of all carriers were rewritten and combined into one section, namely, Section 5. (49 U.S.C.A. 5.) In general, the provisions of the present Section 5 follow Section 213 (49 Stat. 556) of the Motor Carrier Act of 1935 (with such changes as are necessary to adapt the language to all types of carriers) more closely than they follow Section 5 of the Transportation Act of 1920. The provisions of the Transportation Act of 1920 relating to the consolidation of railroads were omitted from the revised Act. The provisions of Section 5 relating to consolidation of carriers as rewritten, having omitted the provisions for a plan of consolidation for railroads, it certainly cannot now be argued that Congress, in the enactment of this statute, intended to inaugurate a plan for the consolidation of motor carriers. When Congress rewrote Section 5 of the Interstate Commerce Act to permit the consolidation of carriers of all types where such consolidation was in the public interest, Congress must have had in mind the construction which the courts had placed upon the phrase "in the public interest." We must now read into this phrase the criteria laid down by this court in *New York Central Securities Corporation* v. *United States,* 287 U. S. 12 at 25 that a consolidation is in the public interest when it is essential (1) to adequacy of transportation service; (2) to the essential conditions of economy and efficiency in the transportation service in-

volved; and (3) the appropriate provisions and best use of transportation facilities. But these do not constitute all the matters that must be considered in determining the "public interest."

In determining the powers and authority of the Interstate Commerce Commission to approve consolidation of motor carriers, all of the relevant statutes as interpreted by the courts must be taken into consideration. Statutes in *pari materia* are to be taken together. These include not only Section 5 of the Interstate Commerce Act but the declaration of the National Transportation Policy as set out in the preamble of the Transportation Act of 1940, and the Sherman Act. In enacting the Transportation Act of 1940, the Congress declared:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, *so administered as to recognize and preserve the inherent advantages of each;* to promote safe, adequate, economical, and efficient service *and foster sound economic conditions in transportation and among the several carriers;* to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions,—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of

the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy" (54 Stat. 899). (Italics supplied).

The inherent advantages of each mode of transportation which are to be recognized and preserved are competitive advantages. Clearly the Congress indicated its desire that these competitive advantages be retained. In this policy, Congress directed the Commission to "foster sound economic conditions in transportation and among the several carriers." From the date of the enactment of the Sherman Law, the maintenance of competition has been deemed essential for sound economic conditions in any industry, including the transportation industry. The only exceptions, so far as carriers were concerned, were under the Transportation Act of 1920, where upon a finding of the criteria required for being in the public interest, competition might be restrained. In the light of all relevant statutory provisions and the decisions construing them, it seems obvious that the Interstate Commerce Commission has not been granted authority or power to approve a consolidation or merger of motor carriers which involves the elimination of substantial competition unless the Commission finds that such merger or consolidation and the elimination of such competition is necessary in order to provide an adequate transportation service. There was no such finding in this case.

The consolidation and merger here proposed will result in the elimination of 13,546 miles of duplicating routes. The Commission found (R. 22) that substantial competition exists between certain of the carriers involved and consummation of the instant transactions would eliminate such competition. There is no evidence whatsoever and no finding that the elimination of this competition is neces-

sary in order to provide an adequate transportation system in the area. In fact, there could be no such finding on this record as all of the evidence is to the contrary.

This case presents a situation in which eight of the largest carriers serving a very substantial portion of the United States are attempting to unite into one gigantic combine. There will be no nucleus of strong competitors around whom a competitive system might be built, in this area. In fact, the carriers, parties to this proposed consolidation, have in most instances conditioned their acceptance of the consolidation upon the inclusion of their principal competitors. The effect of such a huge consolidation of the largest and, in most cases, the most profitable carriers in the area, upon competition is obvious. Smaller carriers cannot possibly compete with the bargaining power of such a combine. While the Commission suggests that if it should develop that anything approaching a monopoly has resulted in the territory affected from the formation and operation of this consolidated system, new carriers might be granted certificates to operate in the territory, it is obvious that such a remedy is of small value. Experience demonstrates that the expense involved in attempting to obtain certificates and the delays which would be encountered by any small concern which might attempt to obtain operating rights within the territory served by this huge combination would be such that the small carrier would be completely discouraged or bankrupt long before authority to operate might be obtained. The Commission's finding that substantial competition would remain, is, it is submitted, not supported by the evidence.

The Commission, in effect, held and the District Court affirmed, that the National Transportation Policy is one

of regulated monopoly insofar as motor carriers are concerned. While the courts are not primarily concerned with the formulation of national policies, the wisdom of a policy based on competition is well illustrated by the recent history of our railroads, which the Commission would have motor carriers follow. Under regulation and with the direction, as set forth in the Transportation Act of 1920, to provide an adequate railway service, there was, nevertheless, no development of railway service. It is a matter of common knowledge that few, if any, improvements were made. It was not until the development of competition from automobiles and motor trucks and waterways that the railroads began to improve their service and schedules. They were shocked out of their complacency by the inroads upon their revenues made by this new source of competition. Improvements in their service were made only when it became necessary to meet this competition.

There is no group more concerned with the character, the adequacy, and particularly the cost, of transportation than the farmers of the country. The farmer is both producer and consumer. He pays the freight from the farm to the market on everything which he produces. He cannot pass it on to the consumer as industry often is able to do. The cost of transportation is added to the price of everything that he must buy. The cost of transportation is the highest single service charge that the farmer has to pay. Low-cost public transportation can be assured only through competition, competition not only between different agencies of transportation but within each field of transportation.

Transportation by motor carrier cannot be likened to transportation by rail. Motor carriers use highways which

are built, improved and maintained at public expense. The low-cost transportation which these highways make possible should not be turned over to private corporations for monopolistic use, either through certificates of convenience and necessity, merger of strong competing lines, or any other governmental device. Competition between carriers and particularly between motor carriers is essential and necessary to preserve low-cost transportation over the highways for agriculture, industry and the consuming public, who bear the expense of these highways.

It is respectfully urged that the Commission and the District Court, in holding that Congress by the enactment of the revised Section 5 of the Interstate Commerce Act, has placed the granting or denying of authority for these consolidations or mergers wholly within the judgment of the Commission, have not correctly interpreted the law. Definite criteria are provided and must be satisfied before a consolidation or merger may be authorized and the parties relieved from the Antitrust laws. Under the law, before the Commission could approve the consolidation and merger here involved and the elimination of competition resulting therefrom, the Commission was required to find that the elimination of such competition was necessary in order to provide an adequate transportation system in the area involved. There was no such finding and the findings and evidence in this case therefore are not sufficient to support the order of the Commission.

II.

The Court erred in that it did not consider and determine the important public questions under Section 5 (2) (b) of the Interstate Commerce Act arising from the facts with reference to the relationship between Arrow Carrier Corporation, Kuhn, Loeb & Company, Transport Company, Inc., and Associated Transport, Inc.

Upon the hearing before the Interstate Commerce Commission, it was urged that the acquisition of Arrow Carrier Corporation by the applicant, Associated Transport, Inc., would result in Kuhn, Loeb & Company, a banking and investment firm with an established history of affiliation with railroad companies, obtaining a substantial interest in the applicant. The evidence showed and the Commission in its report (R. 36) states that upon consummation of the proposed transactions, Kuhn, Loeb & Company, through a subsidiary, would own approximately 13% of applicant's outstanding preferred stock and approximately 9.5% of applicant's outstanding common stock. It was contended that because of the relationship of Kuhn, Loeb & Company with certain railroad companies, this stockholding by Kuhn, Loeb & Company would be in violation of Section 5 (2) (b) of the Interstate Commerce Act (49 U.S.C.A. 5) which in part provides:

"If a carrier by railroad subject to this order, or any person which is controlled by such a carrier or affiliated therewith, within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use

service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

The Commission found (R. 37) that the applicant, Associated Transport, Inc., was not, and upon consummation of the transactions as proposed would not be, affiliated with any railroad. In its report the Commission in dealing with this point states that there is no allegation that Kuhn, Loeb & Company controls any railroad, but because of its relationship with railroads it is contended that possession by Kuhn, Loeb & Company of a financial interest in applicant would be contrary to the public interest, that it would result in restraining competition between the carriers involved and railroads and that applicant would be affiliated with a railroad within the meaning of Section 5 (6). The Antitrust Division of the Department of Justice in its Petition for Reopening and Rehearing (R. 475) offered proof showing the definite relationship of Kuhn, Loeb & Company with the Baltimore and Ohio Railroad Company and the Pennsylvania Railroad Company. This offer of proof was rejected and the Commission approved the consolidation or merger including the acquisition of Arrow Carrier Corporation by the applicant, Associated Transport, Inc. Subsequently, at the request of the applicant, by a supplemental order, the Commission vacated its order of March 16, 1942, in part, and authorized the consolidation or merger without the inclusion or acquisition of Arrow Carrier Corporation. When the matter was before the District Court, the Court referred to the order of the Commission excluding Arrow Carrier Corporation from the merger and proceeded to consider the matter as though Arrow Carrier Corporation had never been a party. However the time allowed by the Commission for carrying the consolidation into effect had not then expired. The Commission by its original

order and by the supplemental order had indicated that it would approve the consolidation and merger either with or without the inclusion of Arrow Carrier Corporation.

This case and the previous proceeding before the Interstate Commerce Commission involving these same motor carriers, among others (Transport Company—Control, 36 M.C.C. 61), represents the first attempt on the part of motor carriers to merge into a gigantic concern, with governmental approval. The action taken in this case will serve as a guide and outline for future attempts to merge motor carriers. The influence of financially powerful banking firms over the affairs of the corporations of which they own a part is greatly in excess of their proportionate stockholdings. The evils which attended the participation of these concerns in railroad transportation are well known. Section 5 of the Interstate Commerce Act, and particularly the provisions of paragraph 2 (b) and paragraph 6 thereof, were designed by Congress to avoid a recurrence of such evils in the motor carrier field. Older forms of transportation, well established in their field and eager to safeguard their position and preserve their investment, attempt to control and stifle new competitive carriers. Congress, in guarding against such a suppression of competition, provided that railroad carriers or concerns affiliated therewith should be permitted to participate in the ownership of motor carriers only where there is a finding that the transaction proposed will be consistent with the public interest and will not unduly restrain competition. Section 5 (2) (b). In paragraph 6 of Section 5, it provided a broad definition of affiliation with a carrier, stating:

"For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason

of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

It is submitted that Kuhn, Loeb & Company has such a relationship with railroad carriers as to bring the proposed original transaction here involved within the provisions of Section 5 (2) (b) of the Interstate Commerce Act. The finding of the Interstate Commerce Commission that the applicant is not, and upon consummation of the transactions as originally proposed would not be, affiliated with any railroad is contrary to the evidence.

It is obvious that if banking houses or other concerns having substantial financial interests in railroad corporations are permitted to acquire an interest in motor carriers serving the same area, their influence may be used to protect the investment in the railroad properties and to retard and stifle competition with the railroads by the motor carriers. As a result, competition between railroads and motor carriers in the area would be restrained or destroyed. This in effect would amount to cartelization of motor vehicle and railroad transportation in the area. The interest of farmers and of the public generally in maintaining competition in the transportation field has been heretofore pointed out. Any action by the Interstate Commerce Commission or by any other governmental agency which results in or tends toward cartelization of

motor vehicle and railroad transportation would seem to be directly contrary to that provision of the National Transportation Policy which directs that the regulation of all modes of transportation shall be so administered "as to recognize and preserve the inherent advantages of each." The interest of the public in the instant case is such that it is urged that the court should follow the rule laid down in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, and followed in *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U. S. 498, and construe Section 5 (2) (b) of the Interstate Commerce Act for the guidance of the Commission in any further proceedings in the present case or in any similar cases hereafter brought.

WHEREFORE, it is urged that the decision below should be reversed and that the Court should order such other and appropriate relief as to the Court may seem just and proper.

Respectfully submitted,

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October 19, 1943.